COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2892-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE MARRIAGE OF:

MICHAEL P. ROGERS,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

CATHY ROGERS,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michael Rogers appeals an order entered following a divorce judgment regarding periodic placement schedules with his three children.[1] He argues that the trial court erroneously exercised its discretion by failing to consider appropriate factors. Michael's former wife, Cathy Rogers, cross-appeals, arguing that under WIS. STAT. § 767.325(1), the trial court is barred from entertaining Michael's motion for two years from the date of entry of judgment. We reject their arguments and affirm the order.

1. Background

¶2 The parties were married in 1989 and divorced in 1999. Based upon their stipulation, the divorce judgment provided that Michael and Cathy would have joint custody of their three children with primary placement with Cathy and would continue attending parochial school for two years. The children were to spend every other weekend with Michael and such other times as they could agree. By stipulation, the court ordered that either party could request a review of Michael's periodic placement schedule within six months.[2]

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1999-2000 version unless otherwise noted.

[2] The divorce judgment provided:

> The appointment for the guardian ad litem for the minor children, Jeffrey Burgfechtel, shall remain in effect for a period of six months from the date of the granting of the divorce. The parties shall work with the guardian ad litem to resolve any difficulties or disputes with regard to physical placement of the minor children, as well as any modifications for the placement schedule that may be appropriate. In the event that the issue of alternate physical placement cannot be worked out with the assistance of the guardian ad litem, any party may request a review before the Court within six months.

¶3 The parties were unable to agree on other times for periodic placement. At a May 2000 evidentiary hearing, the parties testified that Michael lived in the family farm house, and that Cathy had moved to Elmwood, where she was living with her fiancé in his home. She testified that the children were not yet attending school in Elmwood, but that she intended to enroll them there in the fall of 2001.

¶4 Michael testified that Cathy denied him all but the most minimal placement time with the children. Cathy, on the other hand, testified that Michael was abusive, neglectful and that she gave him ample time with the children, but that he did not request more. The parties testified at length as to their disputes regarding the children's birthday parties and extracurricular activities. Michael stated he would like the children to continue attending their present school, St. Joeseph's, in Menomonie. Cathy would prefer the children transfer to the public school in Elmwood near her residence.

¶5 The court found that minimal time with Michael would be harmful to the children. Based on meeting with the children, the court stated: "[Y]ou guys have got to be doing something right" because they had beautiful, enthusiastic, "great kids." The court noted Cathy's allegations of abuse and neglect by Michael, but concluded the allegations were unfounded. The court also took into account the parties' animosity, communication problems and contrasting parenting styles.

¶6 The court set a placement schedule, acknowledging that it was unusual, but explaining that the parties had presented unusually challenging circumstances. The placement schedule provides:

1. From the date of this order until the Christmas break, the alternate physical placement for [Michael] will continue to be every other weekend from 6:00 p.m. on Friday until Sunday at 7:30 p.m.
2. Every Wednesday from 6:00 p.m. during the summer and after school during the school session for an overnight visitation.
3. A two-week period of alternate physical placement with [Michael] during the summer of the year 2000 that will be a full two-week, 14-day period. This alternate physical placement will commence on a Friday at 6:00 p.m. until the Friday of the following two weeks at 6 p.m. The Guardian ad Litem will establish that period of time.
4. During the Christmas school break, the children will spend fifty percent (50%) of the time with each party. The Guardian ad Litem will assist the parties if they are not able to agree on the fifty percent (50%) placement.
5. The children will continue to attend St. Joseph's School for the school year 2000-2001, and commencing the second half of the school year, the minor children will reside with [Michael] with [Cathy] having the same visitation as [Michael] had when the children were living primarily with her.
6. In the summer of 2001, [Michael] will be allowed four (4) weeks of visitation during the summer, and that arrangement has to be determined by May 1 of each year regarding which weeks [Michael] will exercise his alternate physical placement. The Guardian ad Litem will assist the parties in making this determination if they cannot reach an agreement.
7. Commencing the fall of 2001, the minor children will be enrolled in the Elmwood School District with [Michael] having the alternate physical placement of every Wednesday overnight, every other weekend, and holidays as scheduled with the assistance of [the guardian ad litem.]
8. [Michael] gets Spring break except for the year 2001 at which time [Cathy] shall have placement of the minor children during the Spring break, and the petitioner will receive four (4) weeks of alternate physical placement every summer thereafter.
9. [Michael] shall pay no child support for the period of time when the children are primarily residing with him during the second semester commencing January 1, 2001 through May 31, 2001.

The court further ordered that if the parties could agree that the two younger children could attend St. Joseph's School, the court would have no objection. Additionally, based on Cathy's concession, the court ordered that the children were to continue with their religious training at St. Joseph's.

2. Standard of Review

¶7 Issues relating to child custody and placement are addressed to trial court discretion. *See* ***Koeller v. Koeller***, 195 Wis. 2d 660, 663, 536 N.W.2d 216 (Ct. App. 1995). We will not reverse a discretionary determination "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). "Indeed … we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (footnote omitted).

¶8 "A custody determination depends on first-hand observation and experience with the persons involved …." *See* ***Gould v. Gould***, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. *See* WIS. STAT. § 805.17(2). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. *See* ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe witness demeanor and gauge the persuasiveness of testimony. *See* ***id.*** at 151-52.

3. Discussion

A. Michael's appeal

¶9 Michael argues that the trial court erroneously exercised its discretion when it placed the children in his care for only the spring semester of 2001. He contends that the trial court failed to consider the appropriate factors under WIS. STAT. § 767.24.[3] He claims that the court never articulated the

[3] WISCONSIN STAT. § 767.24(5) reads:

> FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian. The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:
>
> (a) The wishes of the child's parent or parents.
>
> (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
>
> (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
>
> (d) The child's adjustment to the home, school, religion and community.
>
> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
>
> (f) The availability of public or private child care services.
>
> (g) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
>
> (h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 48.02 (2).
>
> (i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (a).
>
> (j) Whether either party has or had a significant problem with alcohol or drug abuse.
>
> (k) Such other factors as the court may in each individual case determine to be relevant.

children's strong attachment to both parents or that Cathy unreasonably interfered with his relationship with the children. He also argues that the schedule is unreasonable and that it is not in the children's best interests to transfer schools. He points out that both parties agree to raise the children Catholic, and that to permit them to attend a non-Catholic school contradicts this agreement.

¶10 We are unpersuaded. The court was faced with the daunting task of maintaining stability for the children when the parents were in constant conflict. Cathy testified that during the marriage, she functioned as the primary caretaker and continues to do so. She lives only one block from the Elmwood school, so the children could walk to and from school and after school events. Cathy had also arranged her work hours to be home after school, obviating the need for day care. In addition, St. Joseph's School in Menomonie goes only until sixth grade and, in the fall of 2001, their eldest child would transfer to the Elmwood School. Cathy further testified that although the Elmwood school is not a Catholic school, she would continue their religious training at St. Joseph's.

¶11 Michael, on the other hand, testified that he continued to live in the family's country home about five miles from St. Joseph's, the children's current school. He believed that the children needed to live with him in order to counteract Cathy's interference with his parental rights. While the distance is not great, Michael's circumstances, nonetheless, would require transportation and child care arrangements.

¶12 It is apparent that the court's reasoning was to reach a compromise to balance the children's need to spend time with each parent. The order, placing the children with Michael for five consecutive months, undoubtedly is intended to allow Michael and the children to develop and improve their relationship, as well

as to address his allegations of Cathy's interference. Because the children would be living in the family home and attending their current school, placement with Michael would not be unduly disruptive.

¶13 Nonetheless, the court concluded that summer vacation would be a reasonable time to return the children to Cathy's care. The court ordered very specific periods of placement with Michael to protect his relationship with the children. In doing so, the court implicitly recognized the children's attachment to both parents. The court undoubtedly believed Cathy was truthful when she stated that she would ensure that the children would continue to attend religious training at St. Joseph's, despite attending public school in Elmwood.

¶14 Each of the parties' proposals involved some disruption to the children, because they could no longer continue to live with both parents in their home. The schedule represents a reasonable attempt to accommodate competing factors. Because the court's order reflects a reasonable balance of competing factors, we conclude that it represents an appropriate exercise of discretion.

B. Cathy's cross-appeal

¶15 Cathy argues that the court was without statutory authority to modify the placement schedule set forth in the divorce judgment because two years had not elapsed from the final placement determination, citing WIS. STAT. § 767.325(1).[4] We are unpersuaded. Here, the divorce judgment did not provide a

[4] WISCONSIN STAT. § 767.325 provides in part:

> (1) SUBSTANTIAL MODIFICATIONS. (a) Within 2 years after initial order. Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the initial order is entered under s. 767.24, unless a party seeking the modification, upon petition, motion, or order to show cause

(continued)

final placement determination; instead, it continued a temporary order pending further negotiations.[5] It explicitly stated the placement issues could be reviewed if requested within six months. Cathy fails to demonstrate any objection to this provision of the judgment.[6] Accordingly, we conclude that Cathy failed to preserve her objection to the trial court's ruling that it would review the placement issue. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593-94, 218 N.W.2d 129 (1974) (A party must adequately identify and, with some prominence, argue the issue at trial to preserve it for appeal.). As a result, we need not further address this issue on appeal.

¶16 Next, Cathy argues that the trial court erroneously considered Michael's request because he filed no formal motion seeking review of the placement determination. We reject this argument. First, Michael's petition sought periods of physical placement, and the court held the issue open for six months following the entry of the divorce judgment, so Cathy cannot claim a lack of adequate notice of the proceedings. Second, in November 1999, three months following the entry of the divorce judgment, the guardian ad litem notified the court that the parties were unable to work out a placement schedule. A copy of the

---

> shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child:
>
> 1. An order of legal custody.
> 2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

[5] According to the guardian ad litem's report, Cathy's attorney advised that hostilities would diminish once the divorce judgment resolved financial issues and the parties would then reach a placement agreement.

[6] The record, in fact, reflects that Cathy's attorney approved the form of the judgment.

letter was provided to each party through counsel. Thus, the letter served the same function as a formal motion would have, which was to notify the court and opposing counsel that review of the placement dispute was sought. Accordingly, Cathy fails to demonstrate reversible error.[7]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[7] In her brief, Cathy also alludes to her dissatisfaction with the court's child support and tax deduction decision. Because she does not identify and brief her arguments as separate issues, they are not properly before this court. It is insufficient to merely state a contention without providing support for the position and supporting legal authority. ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).